arguably 'integrally related' to its operation." 87 P.3d at 57. *Compare GMRC*, App. 7a, 13a (GMRC's "proposed transloading and storage facilities are integral to the railroad's operation" and are within STB jurisdiction). Nonetheless, the Alaska Supreme Court recognized that "Congress did not intend ICCTA to preempt state or local regulation with only 'a remote or incidental effect on rail transportation,'" and found that Anchorage's permitting program was not preempted. *Id.*

In addition, unlike the Second Circuit, the Alaska Supreme Court found that preclearance permitting programs are not *per se* preempted when applied to rail transportation. It concluded that a proper preemption analysis required a review of the specific conditions at issue, and a "fact-bound determination" at to their actual impact on railroad operations. *Id.*; *compare GMRC*, App. 13a ("we need not conduct a fact-based inquiry weighing the economic impact"). The conflict between these two cases remains.

3. The Additional Court Splits Identified In The Petition Remain.

As with *Vermont Railway* and *Native Village*, the other conflicting cases discussed in the petition (Pet. 16-21) did not use the STB's jurisdiction as a "bright line" rule to gauge whether the state or local regulation was preempted, nor did they use the Second Circuit's blanket approach to preemption. In *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court did not view the scope of the STB's jurisdiction as being determinative of its decision on preemption. Rather, the court engaged in an extensive discussion and analysis of Section 10501(b) and found that the plain language placed express limitations on the law's preemptive scope. 266 F.3d at 1330. Its discussion of preemption constitutes a plain rejection of the type of *per se* preemption employed by the Second Circuit. *Id.* at 1339 (finding that although the ordinances might "not [be] optimally efficient" for the railroad, they "do not impede the interstate functioning of the railroad industry" and are not preempted).

Other cases cited in the petition, such as *Iowa, Chicago & Eastern R.R. v. Washington County*, 384 F.3d 557 (8th Cir. 2004), and *Home of Economy v. Burlington Northern Santa Fe R.R.*, 694 N.W.2d 840 (N.D. 2005), are similar. They did not measure preemption by STB jurisdiction, and they did not apply the Second Circuit's categorical bar. For example, in *Washington County*, the court found that the administrative proceedings commenced by the state were not *per se* preempted and could continue. 384 F.3d at 561; *see Home of Economy*, 694 N.W. at 846 (finding no preemption when state exerted traditional police power).

In sum, GMRC's jurisdictional argument cannot harmonize the divergent judicial views of preemption under the ICCTA. The Second Circuit's decision that preclearance permitting requirements are *per se* preempted remains in conflict with other courts of appeals and state supreme courts. This Court should grant the petition to bring clarity to this area.

II. GMRC's Policy Arguments Underscore That This Case Involves An Important Question Of State And Federal Relations That Should Be Resolved By This Court.

While GMRC makes valid points regarding a "uniform national rail system" and Congress's intent to standardize "economic regulation" of rail transportation in the ICCTA, it is also clear (and the parties agree) that Congress *did* intend to leave room for States to regulate in this area. Opp. 22-23. As GMRC concedes, and courts have noted, Congress did not intend to preempt "the states' generally applicable police powers to the extent that those police powers do not impose a substantial burden on rail transportation." Opp. 6 n.3. This case, which involves an important and historic police power used by states and local authorities to manage land-use, control economic development, and protect the environment, thus falls at the hazy crossroads of federal and state authority.

Some courts have interpreted the preemptive scope of Section 10501(b) broadly in a perceived effort to standardize

economic regulation of rail transportation. Opp. 2-3, 23-26. For some of these courts, the "balance" of the competing interests of the states and the federal government tips in favor of the federal interests. Indeed, some of these courts have explicitly chosen not to apply the traditional "assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). *See* Opp. 30 (citing *United States v. Locke*, 529 U.S. 89, 108 (2000) (suggesting that "an assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence"); *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

Other courts have recognized the vital interests states have in protecting health, safety, and the environment. *See* Pet. 16 n.9 (citing courts that have found no preemption). Many of these courts have retained the well-established assumption against preemption in cases that involved the exercise of these historic police powers. *Home of Economy*, 694 N.W.2d at 842-43 (citing *Locke*, but retaining assumption); *Native Village*, 87 P.3d at 56 (applying assumption with no mention of *Locke*); *Vermont Railway*, 769 A.2d at 652 (same).

State and local laws, like Act 250, play a crucial role in protecting interests that are not directly regulated by federal law. Pet. 22-25. Congress intended that these laws should be applied when they do not significantly impact railroad operations. The Second Circuit's *per se* bar forecloses states and localities from even attempting to make this showing. As demonstrated by the wide divergence on how courts analyze the preemptive scope of Section 10501(b) and also the results the courts have reached, it is necessary for this Court, for the first time, to provide guidance on this important national issue.

CONCLUSION

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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